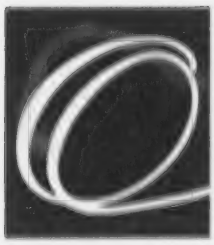

Office of the Ombudsman

2000 ANNUAL REPORT

For the period January 1, 2000 to December 31, 2000

YUKON LEGISLATIVE ASSEMBLY

Office of the Ombudsman

Ombudsman and Information & Privacy Commissioner

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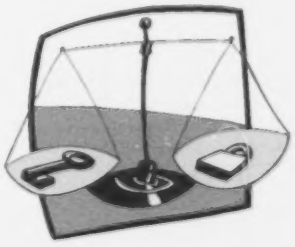


Ombudsman

TABLE OF CONTENTS

Letter to the Speaker 1

Mission Statement 2

Remarks of the Ombudsman and Information & Privacy Commissioner 3

Office of the Ombudsman 4

Year in Review 4

Government's Response to Previous Annual Reports 4

Ombudsman Issues 5

How much information is enough? 5

What should an authority do when someone complains? 5

Tips to assist authorities in handling complaints 6

Will taking a complaint to the Ombudsman meet the complainant's expectations? 6

When is delay unreasonable? 6

Delay could be unreasonable if 7

Does public accountability include saying you're sorry? 7

Ombudsman's Flow Chart of Complaints 8

Statistical Summaries 9

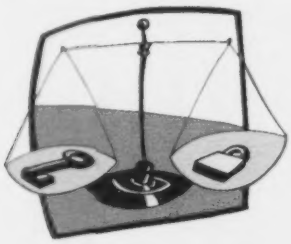
Jurisdictional Ombudsman Complaints Received (by Authority) 9

Resolution of Jurisdictional Complaints Received in 2000 10

Total Complaints Received in 2000 10

Resolution of Complaints received in 2000 10

Investigations Processed in 2000 10



Information and Privacy Commissioner

TABLE OF CONTENTS

Information and Privacy Commissioner 12

Year in Review 12

Investigations - Administration of the *ATIPP Act* 13

Complaints About the Information and Privacy Commissioner 13

Review and Comment on Programs and Legislation 14

Federal Privacy Legislation for the Private Sector 15

Access to Information and Privacy Issues 16

In what ways can personal information be collected? 16

When can't an applicant have access to a record? 16

Could a public body release my personal information without my consent? 16

When can the time limit for a response be extended? 17

Can an individual's rights and interests co-exist under the *ATIPP Act*? 17

Request for Review Flow Chart 18

Statistical Summaries 19

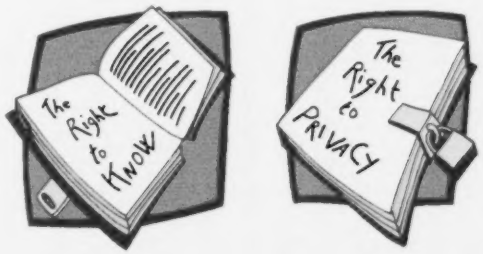
ATIPP Complaints and Requests for Review 19

Means of Settlement 20

Types of Cases 21

ATIPP Cases by Public Body 22

Web Site Links 23



YUKON LEGISLATIVE ASSEMBLY
Office of the Ombudsman

September 2001

The Honourable Dennis Schneider
Speaker of the Legislative Assembly
P.O. Box 2703
Whitehorse, Yukon
Y1A 2C6

Mr. Speaker:

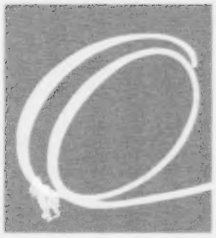
I have the pleasure of presenting to you and through you to the Legislative Assembly the Annual Report of the Yukon Ombudsman and Information & Privacy Commissioner.

This report is submitted pursuant to Section 31(1), *Ombudsman Act* and Section 47(1), *Access to Information and Protection of Privacy Act*. The report covers the activities of the Office of the Ombudsman and the Information & Privacy Commissioner for the period January 1, 2000 to December 31, 2000.

Yours truly,

H Moorlag.

Hank Moorlag
Ombudsman and
Information & Privacy Commissioner



Mission Statement

To provide an independent, impartial means by which public complaints concerning the Government of Yukon can be heard and investigated under the Ombudsman Act.

To provide an effective avenue for receiving and processing public complaints and requests for the review of decisions by public bodies related to the Access to Information and Protection of Privacy Act.

To promote fairness, openness and accountability in public administration.

Office of the Ombudsman

Remarks of the Ombudsman and Information & Privacy Commissioner

In 2000 the Office of the Ombudsman and Information & Privacy Commissioner marked its fourth year of operation. During this period the Yukon Legislative Assembly was required to decide whether the *Ombudsman Act* should continue in force. Under section 35, the *Act* can only remain in effect for a five-year period unless the Commissioner in Executive Council orders a continuation for a period not to exceed five years. During the fall sitting of the Legislative Assembly the *Ombudsman Act* was ordered to be continued in force for a further five-year period.

The year brought some significant challenges to both functions of the office. The impact of an increase in work under the *Access to Information and Protection of Privacy Act* (ATIPP Act) continued, as in the previous year, to create a backlog of Ombudsman case files. Although the problem is now being addressed with the addition of another staff member, regrettably there is evidence that public confidence in the office has eroded. This is indicated by a marked decrease in the number of complaints brought to the Ombudsman. The inability to handle complaints in a timely way is unquestionably a factor. Bringing the standard of service back to an acceptable level is a current priority of the office.

Under the *ATIPP Act*, many requests for review brought forward under section 48 and complaints made under section 42 have challenged the operation of the *Act* in ways that now require a careful examination of all its aspects to determine whether it is achieving its intended purpose.

As an example, the uncertainty of the *ATIPP Act's* definition of a "public body" emerged as a significant issue. This is reported on page 13. As Information and Privacy Commissioner, I conducted an investigation under section 42 of the *ATIPP Act* into how the uncertainty of this definition is affecting the administration of the *Act*. Following investigation a report was made to the Minister responsible for the *Act*, the Minister of Education, with a recommendation for legislative change.

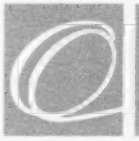
Workload demands related to the *ATIPP Act* more than doubled over the previous year. Despite these demands, the office was able to meet its legislated time frames for the completion of reviews. I acknowledge with gratitude the efforts of the staff of the office, the many officials of public bodies, applicants and third parties who, despite some significant frustration, demonstrated a commitment to the process and in so doing helped bring these matters to a close in a timely way.

During the year, cases also surfaced which required the office to develop and implement policy to handle situations where competing interests between the two functions of Ombudsman and Information & Privacy Commissioner exist. This occurs when an individual wishes to trigger a review or a complaint under the *ATIPP Act* and simultaneously brings a complaint to the Ombudsman. The policy requires a careful analysis that balances the interests of the complainant against the practical realities of the Ombudsman and Information & Privacy Commissioner being the same person. In consultation with the complainant, a decision under the policy is made about which of the two functions best address the issues.

Both the *Ombudsman Act* and the *Access to Information and Protection of Privacy Act* have as their underlying purpose the promotion of openness and accountability in public administration. The powers and authorities in these statutes compel government ministries and agencies to open themselves up to scrutiny by way of independent review and investigation. The introduction of this legislation in other jurisdictions around the world typically results in one of two responses by government. There is either an acceptance of the spirit and intent of the legislation followed by proactive measures to adopt them, or a defensive posture with continued intransigence on the part of the bureaucracy broken only on occasion by applying the full weight and authority of the legislation.

I am pleased to report that, from my point of view, the Government of Yukon has made steady progress over the past four years toward positive changes that adopt

the principles of openness and accountability. Some of these initiatives have been reflected in the way government has responded to issues brought to this office. On the other hand, there is plenty of room for improvement. One government official made the following comment: "We are reaching a level of maturity; now it is time for the development of expertise." In this context, it is gratifying to see the introduction of the Service Leadership Program which challenges public servants to think about new ways to deliver services.



Ombudsman

Year in Review

In 2000, a total of 86 complaints were received over which the Ombudsman had the jurisdiction to investigate. This compares with 121 complaints in 1999 and 144 in 1998. The downward trend in the number of complaints coming to the Ombudsman is to some extent the result of significant improvements in public administration. Changes in the way government responds to public complaints through appropriate early intervention has reduced the need for complaints to be handled by the Ombudsman.

Another reason for the drop in the number of complaints, however, appears to be that public confidence in the ability of the Ombudsman to complete investigations within a reasonable time frame has been eroded. The year was marked by increased frustration on the part of complainants with the lack of progress on their files. Unquestionably this has led to decisions by the public to not bring their complaints forward.

The last two annual reports commented on the impact work done under the *ATIPP Act* had on the ability of the office to complete other outstanding matters. The substantial increase in ATIPP work has taxed the resources of the office in ways that have contributed to a large backlog of Ombudsman files. The problem was identified in the budget estimates presented for review by the Members' Services Board. However, because of the territorial election in 2000 and the subsequent change in government, the review of the budget did not occur until June, 2000. The review resulted in approval to hire an additional investigator to the end of the 2000/01 fiscal year. This increase was confirmed as a permanent resource requirement with the next budget review.

The office hired Susan Dennehy who had previously been performing investigative work under contract. Credit and recognition must be given to Catherine Buckler, Assistant to the Ombudsman and Alice Purser, Administrative Assistant, for their dedicated commitment and hard work in addressing the office's workload demands during the year. The new office team is attacking the workload with renewed vigour, and considerable progress is being made to bring the files to within an acceptable standard of service.

Thirty-two investigations were brought forward to 2000. During the year, 12 new investigations were opened, and a total of 17 were completed. There were still 27 complaints under formal investigation at year end. This is a reduction from the number of investigations carried forward from the previous year.

In the annual reports from 1996 to 1998 it was the practice to provide summaries of case files with the personal information of those involved removed. A problem unique to a small jurisdiction like the Yukon was discovered: individuals could still be readily identified through other details of the case. Even though specific case summaries were interesting to read, they failed to articulate in a clear way the underlying issue that was being addressed.

In last year's annual report the format was modified, to reflect the case work of the office through issues that were brought forward and settled. This seemed to better identify and discuss broader aspects of government administration and still maintain the confidentiality required by section 10 of the *Ombudsman Act* in carrying out investigations. The practice is continued in this report.

Government's Response to Previous Annual Reports

The 1998 Annual Report identified a number of issues consisting of common elements in complaints handled

by the Ombudsman. These included a need to improve communication and to introduce a means of early appropriate intervention when disputes arose. Government responded by introducing an action plan with four initiatives designed to improve the quality of services provided by government. This was reported in last year's annual report.

During the year 2000 the initiatives previously introduced were rolled into three noteworthy developments. The first was a continuing staff development plan headed by a Deputy Ministers Committee on Human Resources. As part of a framework committed to strengthening public sector management, the Committee facilitated consultation with some 180 Government of Yukon managers and senior supervisors. The goal was to begin a dialogue regarding professional and leadership development needs. The Committee produced its report on these consultations in December 2000. Although much of the focus of this work related to staff development and succession planning, the attention to sound leadership and best-practices in the delivery of services touched directly on issues identified by the Ombudsman.

The second development of significance was the introduction of the Service Leadership Program. The program was developed following "Red Tape Reduction" consultations with both the business community and the public, as well as the need for improvement identified by the Ombudsman in the 1998 Annual Report. The purpose of the Service Leadership Program was to provide a quality service course for public servants with facilitated group discussions aimed at finding concrete ways to improve public service. The goal was to come up with new ideas which would redesign how the Government of Yukon served its clients.

The third important development was an individual initiative by an Executive Council Office staff member who, as part of post-graduate studies, researched and developed a custom-built conflict management system for government departments. These efforts were supported by the Deputy Ministers Committee and the system has been introduced as a pilot program within the department of Government Services.

The Ombudsman commends the government's efforts in this direction and especially applauds the kind of individual commitment and work to improve the quality of service delivery exemplified by the development of the conflict management system.

Ombudsman Issues

How much information is enough?

Although government is working to improve service to clients there are still difficulties in the way that an authority communicates its programs to the public.

During 2000, this lack of information, coupled with some inconsistencies in the information provided to clients, led to two complaints being investigated by the office. Where final decisions are Ministerial, the public must also be made aware of the criteria considered.

- The first level of communication, such as an application form or brochure, may not be detailed enough for those individuals having unique circumstances or specific needs.
- A second level of communication such as correspondence and detailed explanations of legislation governing the program is often required.
- The public must be able to obtain the specific information that will help them understand an authority's decision or action about themselves.

What should an authority do when someone complains?

It is human nature to react by defending one's actions when someone complains. But is it the best way to deal with a complaint? When a complaint about government is brought forward an attempt should be made to look at it in a positive light. As such, the Office of the Ombudsman promotes early intervention as a way to handle complaints.

Early intervention not only benefits the complainant but it also benefits the authority in several ways, including the following:

- creating another chance to provide service and satisfaction to dissatisfied clients;
- identifying areas for improvement;
- providing opportunities to strengthen public support for the agency; and
- assisting and planning an allocation of resources.

Authorities should keep in mind that the client with a complaint wants:

- a friendly contact person
- quick action
- to be heard
- an apology
- to be understood

The Ombudsman finds that complaints which are not swiftly resolved generate significant additional workload for an authority, often snowballing into something bigger than it ever needed to be. This can impact on staff morale.

Tips to assist authorities in handling complaints

- have a user friendly system for accepting customer feedback/complaints;
- ensure there are clear delegations and performance expectations of staff dealing with complaints, such as turn around time, progress reports, and quality of responses or remedies;
- develop clear internal and external referral procedures if a complaint is not resolved at the front line... make sure the customer knows what to expect;
- capture feedback/complaint data;
- use the data to identify problem areas and analyze trends; and
- act to improve identified areas.

Will taking a complaint to the Ombudsman meet the complainant's expectations?

When a complaint is given to the Ombudsman it is analyzed to ensure that the Ombudsman has the authority under the legislation to investigate the complaint. The Ombudsman must also discuss a complainant's expectations regarding any possible recommendations that could be made by the Ombudsman at the end of an investigation, if the complaint is found to be substantiated.

It is important to realize that under section 14 of the *Ombudsman Act*, the Ombudsman can refuse to investigate a complaint on several discretionary grounds. For instance if a complainant is expecting an outcome that the Ombudsman couldn't provide even if the complaint were substantiated, then the Ombudsman may refuse to investigate. The refusal is made on the basis that the investigation would not benefit the complainant in a way that he or she would find satisfactory. Here are some examples:

- If a complainant is seeking a monetary settlement, it may be preferable for the complainant to seek legal redress.
- A complainant may expect that the Ombudsman, after hearing a matter, will substitute his own decision for one already made by an authority. This will not occur, since the Ombudsman is not an appeal body.

Another case where the Ombudsman may refuse to investigate is if a complaint is made with the sole intent of embarrassing government or is made for some oblique purpose. This would be refused on the basis that the complaint is frivolous, vexatious, or not made in good faith.

Complainants sometimes expect an investigation to uncover information that they could use for another purpose like a court action. This is an unrealistic expectation. The specific information obtained during investigation is not shared with either the complainant or the authority being complained about. However the authority is made aware of the nature of the complaint. If the complaint is substantiated the Ombudsman will give recommendations, with the necessary justification for them, to the authority and will notify the complainant. The only information the complainant can reasonably expect to obtain is whether the complaint is substantiated or not.

When is delay unreasonable?

In 2000 there were twelve complaints related to the issue of unreasonable delay. In most cases, the complainant was waiting for a decision from an authority. With half of these complaints, once the authority was notified that the Ombudsman had received a complaint, the necessary action was taken and there was no further delay. Once the delay no longer exists the investigation ceases as the originating complaint is only about the delay, not about the adequacy of the action.

An investigation of a complaint of unreasonable delay has a very high priority, as the lack of a decision or action can often prejudice the person waiting by not allowing them to take any further action.

Delay is unreasonable whenever service to the public is postponed improperly, inconsistently, unnecessarily or for some irrelevant reason.

In only one instance in 2000 did the Ombudsman carry out a full investigation on a complaint of unreasonable delay. In that instance the Ombudsman made a distinction between delay and unreasonable delay.

The primary purpose of the investigation was to determine if there was delay. If this was substantiated, the secondary purpose would be to examine the reasons for the delay to determine whether it was an unreasonable delay.

In this particular investigation, although there was delay, it was not found to be unreasonable delay.

Delay could be unreasonable if:

- no reasons are given for the delay;
- the authority has not communicated appropriately with the complainant about the delay;
- any inconsistent treatment resulting in delay is not explained;
- the factors contributing to the delay are unfair, irrational or illogical; or
- discretion used in making a decision has not been properly exercised.

Does public accountability include saying you're sorry?

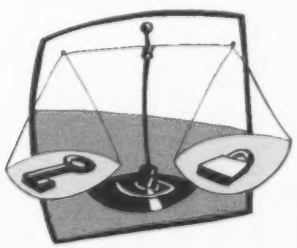
Often a complainant would like an apology to be one of the outcomes of an Ombudsman investigation. Apologies are an important part of our social fabric, because a sincere expression of regret has a lot of power to mend and to allow all involved in a situation to move on.

An apology, however, is more then saying you're sorry. It has several important components. First there needs to be an acknowledgement of wrongdoing, an explanation of why the wrongdoing took place, an expression that harm was not intended and an expression of regret. An acknowledgement of harm to the victim and an offer of reparation are essential.

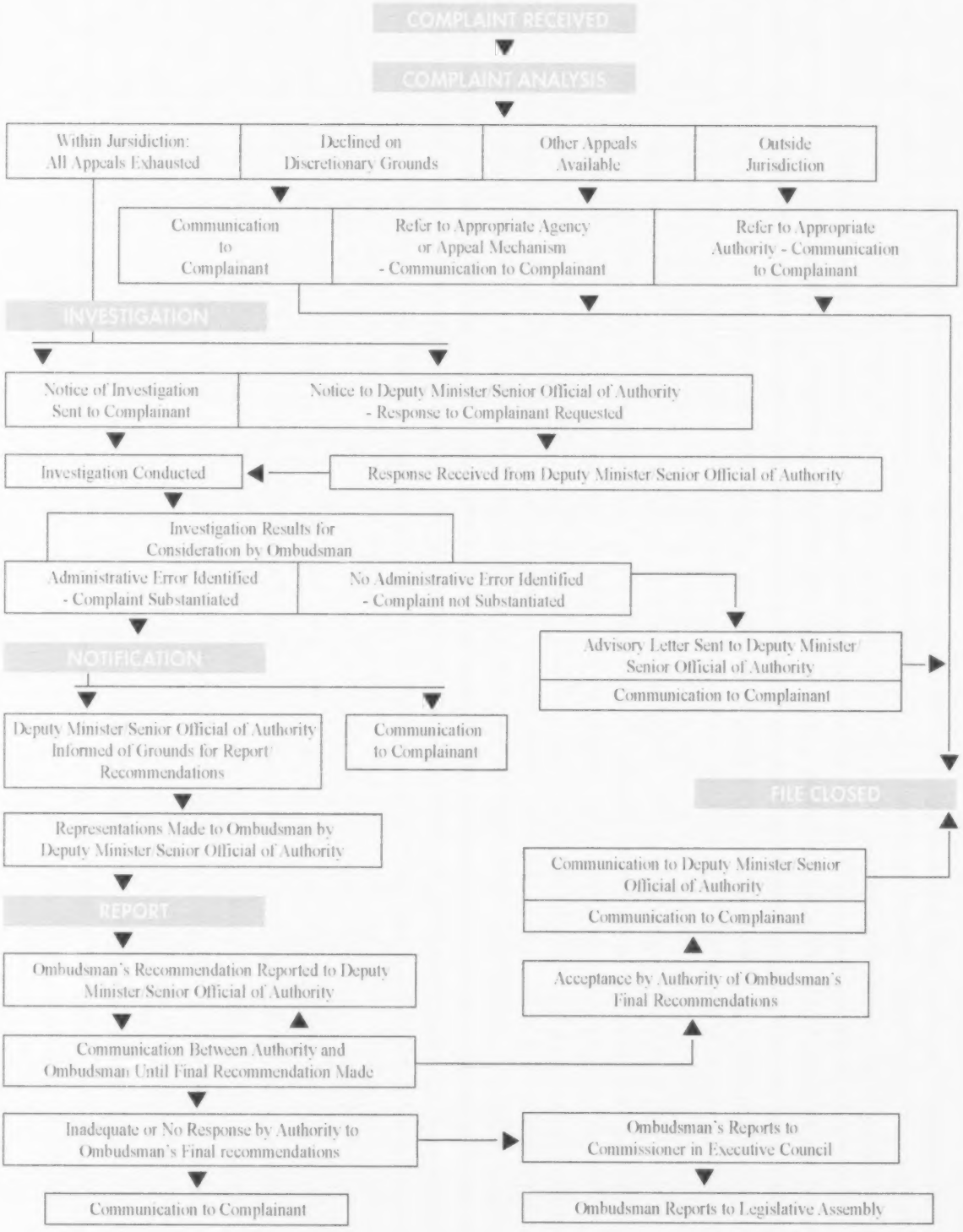
When an Ombudsman complaint is substantiated, in addition to other recommendations, the Ombudsman may require that the authority write a letter to the complainant. The recommendation requires the authority to acknowledge the validity of the complaint, to explain what went wrong and why, and to advise the complainant what steps have been taken or are proposed to correct things.

Although the Ombudsman stops short of requiring an authority to make an apology, the recommendation, when given effect, is an acknowledgement of error and is a demonstration of public accountability. Such communication makes it possible for the parties to mend their relationship and for the authority to foster and maintain public confidence.

"Sometimes fairness means having to say you're sorry."
Dulcie McCallum, former B.C. Ombudsman



Ombudsman's Flow Chart of Complaints


COMPLAINT RECEIVED
COMPLAINT ANALYSIS
Within Jurisdiction: All Appeals Exhausted
Declined on Discretionary Grounds
Other Appeals Available
Outside Jurisdiction
Communication to Complainant
Refer to Appropriate Agency or Appeal Mechanism - Communication to Complainant
Refer to Appropriate Authority - Communication to Complainant
INVESTIGATION
Notice of Investigation Sent to Complainant
Notice to Deputy Minister/Senior Official of Authority - Response to Complainant Requested
Investigation Conducted
Response Received from Deputy Minister/Senior Official of Authority
Investigation Results for Consideration by Ombudsman
Administrative Error Identified - Complaint Substantiated
No Administrative Error Identified - Complaint not Substantiated
Advisory Letter Sent to Deputy Minister/ Senior Official of Authority
Communication to Complainant
NOTIFICATION
Deputy Minister/Senior Official of Authority Informed of Grounds for Report/ Recommendations
Communication to Complainant
FILE CLOSED
Representations Made to Ombudsman by Deputy Minister/Senior Official of Authority
Communication to Deputy Minister/Senior Official of Authority
Communication to Complainant
REPORT
Ombudsman's Recommendation Reported to Deputy Minister/Senior Official of Authority
Acceptance by Authority of Ombudsman's Final Recommendations
Communication Between Authority and Ombudsman Until Final Recommendation Made
Inadequate or No Response by Authority to Ombudsman's Final recommendations
Ombudsman's Reports to Commissioner in Executive Council
Communication to Complainant
Ombudsman Reports to Legislative Assembly

Statistical Summaries

Jurisdictional Ombudsman Complaints Received in 2000
(by Authority)

Authority	Under Investigation	Otherwise Resolved	Total Complaints
Community & Transportation Services	2	8	10
Economic Development	–	1	1
Education	2	2	4
Government Services	–	4	4
Health & Social Services	1	22	23
Justice	–	4	4
Public Service Commission	3	4	7
Renewable Resources	1	2	3
Whitehorse Correctional Centre	2	10	12
Yukon College	1	1	2
Yukon Housing Corporation	–	2	2
Yukon Human Rights Commission	1	–	1
Yukon Legal Services Society	–	2	1
Yukon Medical Council	1	–	1
Yukon Utilities Board	–	1	1
Yukon Workers' Compensation Health & Safety Board	3	7	10
Total Complaints 2000	**17**	**69**	**86**
Total Complaints 1999	25	96	121

Resolution of Jurisdictional Ombudsman Complaints Received in 2000

Total Complaints Received in 2000	**86**
Total Ombudsman complaints opened as investigation	12
Ombudsman complaints under analysis	6
Total Ombudsman complaints otherwise resolved	70

Note: these numbers may include complaints not yet classified as of December 31, 1999.

Resolution of Complaints Received in 2000

71% Referred to other remedy or appeal: 61

1% Otherwise resolved: 1

3.5% No authority to investigate: 3

13% Formal Investigation: 11

2% Insufficient information provided: 2

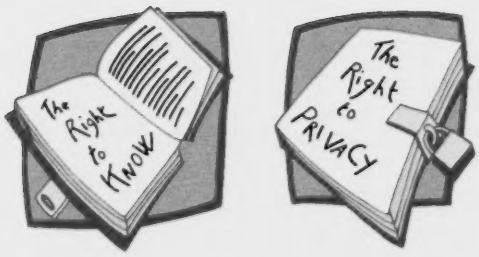
3.5% Other: 3

6% Not yet classified: 5

Investigations Processed in 2000

Brought forward from 1999	32
Opened in 2000	12
Total	**44**
Completed in 2000	17
Carried over to 2001	27

Report of the Information and Privacy Commissioner



Information and Privacy Commissioner

Year in Review

In last year's report the Commissioner commented on the extent to which the government has adopted the principles of the *Access to Information and Protection of Privacy Act* (*ATIPP Act*). As part of that discussion the Commissioner expressed the concern that an adequate administration of the *Act* by government might not be sustained with the existing resources in the public service. Despite an appropriate level of compliance with the *Act*, it was feared that a culture might develop, through the frustration of trying to meet the significant demands of the legislation, that would be in direct conflict with the very openness and accountability the *Act* is intended to produce.

For some departments the resource requirements in 2000 doubled that of 1999. This applied not only to the work involved in responding to access requests, but also the resource intensive tasks of responding to reviews by the Commissioner. In this report, as in the 1999 annual report, the Commissioner urges government to take steps to ensure public bodies, including the office of the Archivist, are adequately resourced to meet the demands of the *ATIPP Act*.

For the Office of the Information and Privacy Commissioner, the number of cases received by way of complaints under section 42 of the *ATIPP Act* and requests for review under section 48, more than doubled that of last year: 76 compared to 32 in 1999.

When section 48 requests for review are received, the Commissioner authorizes a mediator to investigate and try to settle the matters under review. Requests for review this year totaled 32. The Assistant to the Commissioner was successful in settling 5 of these cases through mediation. The remaining 27 went to inquiry by the Commissioner. This compares to 2 cases settled by mediation and 5 inquiries in 1999.

Section 42 of the *ATIPP Act* gives the Commissioner responsibility to monitor how the *Act* is administered to ensure its purposes are achieved. As part of this responsibility, the Commissioner may receive comments or complaints from the public, conduct investigations and make reports. It is the practice of the Commissioner to receive such public complaints and comments, and group them into common issues to determine if sufficient grounds exist on which to base an investigation.

During the year 30 such complaints were received by the Commissioner. This compares to 10 in the previous year. In 1999 the workload of the office had not permitted the completion of investigations related to Section 42 complaints, save three that involved matters critical to the administration of the *Act*. They are reported under the heading "Investigations – Administration of the *ATIPP Act*" on page 13.

Section 47(1)(b) of the *ATIPP Act* requires the Commissioner to report annually to the Speaker of the Legislative Assembly any complaints and reviews of complaints to the Commissioner about the Commissioner's decisions, acts, or failures to act.

The purpose of including these complaints in the Annual Report is to provide a means for the Commissioner to be accountable. Because the Commissioner is an independent officer of the Legislative Assembly, no other mechanism exists to deal with complaints about the Commissioner's conduct. These matters are reported under the heading "Complaints about the Information and Privacy Commissioner" on page 13.

In previous annual reports the Commissioner commented on the requirement under section 63 of the *ATIPP Act*, for the Minister responsible for the *Act* to publish a directory to assist in identifying and locating records. This directory of government information was finalized and published in 2001. The Commissioner commends the work of the Archivist and her staff in coordinating the contributions of all public bodies to make the directory as comprehensive and inclusive as possible. The directory will assist greatly in making a successful transition from the "information" which applicants seek to the "records" which the public bodies identify.

Investigations – Administration of the *ATIPP Act*

During the year the Commissioner completed three investigations under section 42 of the *ATIPP Act*. These investigations were conducted under the general powers given to the Commissioner including the responsibility to monitor how the *Act* is administered to ensure its purposes are achieved.

The first investigation related to the effect the uncertainty of the definition of a "public body" in section 3 has on the administration of the *Act*. Under the definition, Boards, Commissions and other similar agencies are only public bodies if they are created as "an agent of the Government of the Yukon". Some Boards and Commissions have argued that because they are established for the purpose of making decisions that are independent of government, they cannot possibly be considered to be agents of the crown. On the other hand, it is argued that if these entities operate to serve a public purpose, the appointment of its members are by the Executive Council, and they are funded entirely by government, surely they are agents of the government.

There is no provision in the *ATIPP Act* for the Commissioner to decide the question of whether an entity is a public body at the point where an access to information request is made. It is the responsibility of the Archivist to receive such requests and forward them to the appropriate public body. In some cases these requests have been forwarded to government departments having the custody of the Board's records. However, the department finds it cannot make decisions on questions of access for or on behalf of an entity that may not be a public body. The Commissioner's investigation resulted in a report to the Minister responsible for the *ATIPP Act*, the Minister of Education, with recommendations for legislative change.

The second investigation involved the practice of the Archivist, in receiving access requests, to "action" access requests at some point after the request was received in the office. The *ATIPP Act* requires the Archivist to respond to an applicant's request within thirty days of when the request was received. In some situations, such as when a request is received at closing time on a Friday before a long weekend and the earliest it can be actioned by forwarding it to the appropriate public body is Tuesday of the next week, the Archivist would begin the thirty day time period four days after the request was actually received. In response to the investigation, the Archivist changed this practice to have the thirty days begin from the day the access request is received.

The third investigation questioned the process the Archivist was using to deal with access to information requests related to Boards, Commissions and such similar agencies. This followed up on the first investigation described above. It examined what seemed to be an inconsistent practice of either forwarding a request to such agencies without deciding the question of whether they are a public body, or forwarding it to a government department having some relationship with the agency, or not forwarding it anywhere on the basis of a decision that the entity is not a public body under the *ATIPP Act*. It was hoped that some appropriate consistent response could be made to such access requests. The investigation concluded, however, that such a response is not possible given the uncertainty of the definition of a public body. The only solution to this problem is a legislative amendment that will provide absolute clarity on which entities are public bodies and which are not.

Complaints About the Information and Privacy Commissioner

Section 47(1)(b) of the *ATIPP Act* requires the Commissioner to report annually to the Speaker of the Legislative Assembly any complaints and reviews of complaints to the Commissioner about the Commissioner's decisions, acts, or failures to act.

The purpose of including these complaints in the Annual Report is to provide a means for the Commissioner to be accountable. Because the Commissioner is an independent officer of the Legislative Assembly, no other mechanism exists to deal with complaints about the Commissioner's conduct.

The following complaints were made in 2000:

1. A third party to an access request sought a review by the Commissioner of a public body's decision to disclose certain information to the applicant. The third party believed disclosure would be harmful to the business interests of the third party. The Commissioner determined, on the evidence presented at inquiry, that the third party's business interests would not be harmed and recommended disclosure of the records to the applicant. The third party then sought to have the Commissioner reconsider his decision on the basis that the third

party had unfairly been denied the opportunity to produce other relevant information that the Commissioner should have considered in the first instance. The Commissioner considered the third party's request, but decided the circumstances did not warrant reopening the inquiry. The third party was dissatisfied and expressed the opinion that the Commissioner's decision was improper. Although the third party gave notice to the public body involved of its intent to appeal to the Yukon Supreme Court as provided for in the *ATIPP Act*, an appeal was not made.

2. A person who had brought numerous requests for review and complaints under the *ATIPP Act* to the Commissioner exercised the right of appeal on one matter to the Yukon Supreme Court. Many other matters were still outstanding before the Commissioner. The person then wrote asking that the Commissioner invoke a provision of the *Act* in cases of a conflict of interest for the appointment of an Acting Commissioner. The person believed that the appeal now brought the Commissioner into an adversarial relationship and the outstanding matters could not be properly considered by the Commissioner. The Commissioner disagreed that the appeal created a conflict, and refused to take steps for the appointment of an Acting Commissioner. The person then wrote to the Speaker of the Legislative Assembly seeking the removal of the Commissioner or, in the alternative, to appoint a retired judge to deal with the outstanding matters. When that approach failed, the person then launched a court action in the Yukon Supreme Court for an order prohibiting the Commissioner from dealing with the outstanding matters. The Court heard the matter and dismissed the case in its entirety. This decision is currently being appealed.

3. During the course of handling reviews public bodies have regularly made complaints to the Commissioner about the process used for conducting reviews, particularly for inquiries. Public bodies find the process cumbersome, unreasonably restrictive for deadlines, very resource intensive and excessively bureaucratic. Opinions have been expressed that the inquiry process can be more investigative in nature rather than adhering to the formal model of an administrative tribunal. The Commissioner has responded that the *ATIPP Act* is modeled on the British Columbia information and privacy legislation and includes the same provisions for conducting inquiries. For that reason the office has adopted the BC inquiry process. This position notwithstanding, the Commissioner has made efforts to modify the process to make it less demanding. This includes introducing a practice of holding a pre-inquiry conference to focus the parties' submissions only on the information required by the Commissioner to settle the matters under review. Nevertheless, a view is broadly held by public bodies that an investigative process similar to the practice in Manitoba would be better suited to this jurisdiction. The Commissioner believes a review of the *Act*, now that it has been in place for a four-year period, should be conducted and that this aspect of the *Act's* administration be included.

Review and Comment on Programs and Legislation

One of the roles of the Information and Privacy Commissioner is to comment on government programs or proposed legislation that can impact the privacy or access rights of Yukoners. During 2000, the Commissioner was asked to provide comment on three occasions.

1. Red Tape Reduction Initiative/Change of Address Notification

The Deputy Minister of Government Services asked the Commissioner to review a government-wide change of address notification form. The intent of this new initiative is to provide a one window point of contact for a change of address. Government would then ensure all other applicable contact points in government make the requested change. This project was part of the government's red tape reduction initiative.

In reviewing the proposal the Commissioner emphasized the right of individuals to control over their own personal information and suggested the form allow individuals themselves to identify the specific contact points within government.

2. Yukon Women's Hall of Fame

The Commissioner was asked to comment on privacy protection implications for establishing a Yukon Women's Hall of Fame. At issue was how to collect personal information of nominees and develop an induction process that complies with a standard of fair information practices. The Commissioner pointed to the

following privacy principles as set out in the *ATIPP Act*:

- whenever possible, collect personal information from the person the information is about;
- clearly state the purpose for which personal information is being obtained;
- obtain informed consent if personal information is to be collected from other sources;
- provide access to the personal information collected and an opportunity for correction; and
- obtain consent for its disclosure.

3. Electronic Documents Act

The Commissioner commented on proposed legislation that would allow more government services to be conducted electronically. The Commissioner made the following observations:

- When a person initiates a transaction, the proposed legislation contained a provision that the "consent to provide, receive or retain information or a record in electronic form may be inferred from the person's conduct." The Commissioner expressed the view that this seemed to change the standard from informed consent to implied consent, in which case it did not comply with principles set out in the *ATIPP Act*.
- The proposed legislation made provision for the correction of information sent electronically. However, the standard for corrections fell short of the *ATIPP Act* requirements for the correction of personal information in the custody or under the control of a public body. There was no requirement to confirm with the individual to whom the information pertains, that a correction had actually been made.

Federal Privacy Legislation for the Private Sector

The first stage of the *Personal Information Protection and Electronic Documents Act* came into effect on January 1, 2001. This federal *Act* sets out regulations for how private sector organizations may collect, use or disclose the personal information of individuals in the course of their commercial activities.

The *Act* applies in all of Canada during its initial stage, to the personal information of customers and employees of federally regulated organizations such as banks, telephone companies, broadcasters, and air carriers. In the Yukon and the two other territories this legislation applies to all the federally regulated organizations as well as to all of the commercial private sector involved in the collection, use or disclosure of personal information for commercial activities.

Under the new law, individuals have the right to:

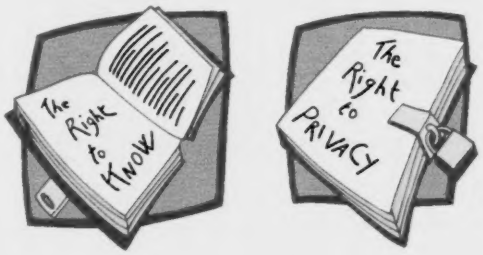
- ask organizations why the information is being collected;
- refuse to give consent to organizations to collect their personal information;
- have personal information used only for the purposes for which it was initially collected;
- request access to see their own personal information; and
- challenge the accuracy and completeness of this information, and have it corrected, if necessary.

The *Act* will come into effect in three stages and by January 1, 2004 will apply in all of Canada to the commercial use of personal information within individual provinces including health information, unless substantially similar legislation has been passed by a province or territory.

The Privacy Commissioner of Canada oversees the *Act* and may investigate complaints under section 11 of the *Act*.

For more information contact the Privacy Commissioner of Canada:

Toll free: 1-800-282-1376
E-mail: info@privcom.gc.ca
Web site: www.privcom.gc.ca



Access to Information and Privacy Issues

In what ways can personal information be collected?

In 2000, the Information and Privacy Commissioner conducted several inquiries into collection, use and disclosure of personal information. One inquiry dealt more specifically with the collection of an individual's personal information.

The *ATIPP Act* states that personal information should be collected directly from the individual, except in very specific circumstances. A public body is required to tell the individual from whom it collects personal information, the purpose for collecting it, the legal authority for its collection, and the identity of someone from the public body who can answer the individual's questions about the collection. When collecting an individual's personal information indirectly, either from within or from elsewhere, a public body must ensure that it has the necessary authority and that guidelines have been followed.

The definition of personal information only includes "recorded" information. The *ATIPP Act* cannot govern the personal opinions people have, nor the impressions they form, nor information consisting of shared confidences or rumour. The Information and Privacy Commissioner maintains that individuals need to "safeguard their own personal information and be circumspect about its disclosure".

"I believe individuals should safeguard their own personal information and be circumspect about its disclosure."

When can't an applicant have access to a record?

In determining whether an applicant is entitled to access to a record under the *ATIPP Act*, a public body must examine the specific exemption provisions contained in Part 2 of the *Act*. The Information and Privacy Commissioner has stated that "in the absence of any reason as provided for in the exemption provisions of section 15 through 25 of the *Act*, the Applicant must be given access to the requested records." The public body cannot rely on any other sections of the *Act* for not disclosing records.

The public body also must make a decision about whether or not the disclosure of the requested information would be harmful to any third party's interests. Consent can be sought, but the public body's decision about disclosure cannot be predicated on the third party's response or lack of response to a request to give consent. Instead the public body itself must make a decision by applying the tests under sections 24 or 25 of the *Act*.

Section 24 of the *ATIPP Act* describes a three-part test to determine if disclosure is harmful to the business interests of a third party. All three parts of the test must be satisfied for the section to apply.

Some sections, such as 16 through 23, indicate that a public body may refuse to disclose a record. This means that the public body's decision whether or not to use any of these sections as an exemption is discretionary and the pros and cons of public accountability balanced against the protection of privacy must be fully considered by the public body.

Could a public body release my personal information without my consent?

If someone else is making a request for access to a record that contain personal information about you, you are regarded as a "third party" by the *ATIPP Act*.

The public body needs to consider a number of issues when deciding whether or not to release third party personal information. At this point the public body may contact the third party to seek consent to release the information.

It is not only consent of the third party that is considered, however. In determining whether disclosure of personal information would be "an unreasonable invasion of a third party's personal privacy" under section 25, the public body must consider all the relevant circumstances. Section 25 contains a non-exclusive list of criteria that are to be used in determining whether or not to disclose a third party's personal information. If, after considering all the relevant circumstances, including those specifically listed in section 25, the public body has determined that releasing the information will result in an unreasonable invasion of a third party's personal privacy, the public body is required to refuse access.

After considering all the relevant circumstances, the public body can determine that releasing the information will not result in an unreasonable invasion of a third party's personal privacy. Before giving access, however, the public body must give the third party notice of their decision. The third party has an opportunity to make written representations to the archivist about the release of the information being requested. The archivist will then give notice of the public body's final decision to the third party. Time is provided before the records are actually disclosed in the event the third party requests the Information and Privacy Commissioner to review the decision to disclose the records.

When can the time limit for response be extended?

The *ATIPP Act* requires that the public body must enable the archivist to respond to a request for access to records in 30 days. However, there is an option to extend the time limit. The archivist can grant an extension only in the following instances:

- the public body requires more detailed information from the applicant;
- a large number of records are requested and more time is required to process the request without interfering with normal operations;
- more time is needed to consult with a third party or another public body; or
- a third party asks for a review.

Extensions cannot be granted for any other reason.

An applicant can request that the Information and Privacy Commissioner review the decision to extend the time limit for responding. At one inquiry in 2000, requiring more time to obtain legal advice was not an accepted reason for an extension under the *ATIPP Act*. In his report the Commissioner stated: "ATIPP Coordinators receive special training in these matters and ... it would have been helpful in this situation to at least conduct some initial analysis that might then reduced the need for formal legal advice." He also pointed out that: "... the intent of the access to information legislation is to require public bodies to be more open, not to reluctantly surrender only the minimum amount of information required by the strictest application of the law".

Can an individual's rights and interests co-exist under the *ATIPP Act*?

The Access To Information and Protection of Privacy Act is a rights-based scheme, process for providing access to information, as is a review by the Commissioner. This differs from an interest based dispute resolution process. A dispute can develop when someone requests and obtains information based upon their "legal rights" yet the information doesn't address underlying interests they may have.

When someone's interests can't be met within a rights based system, people may conclude that the process isn't fair. In the experience of this office, repeated ATIPP requests are often a result of the applicant not being satisfied with the outcome of the original request. This can often result in the escalation of disputes.

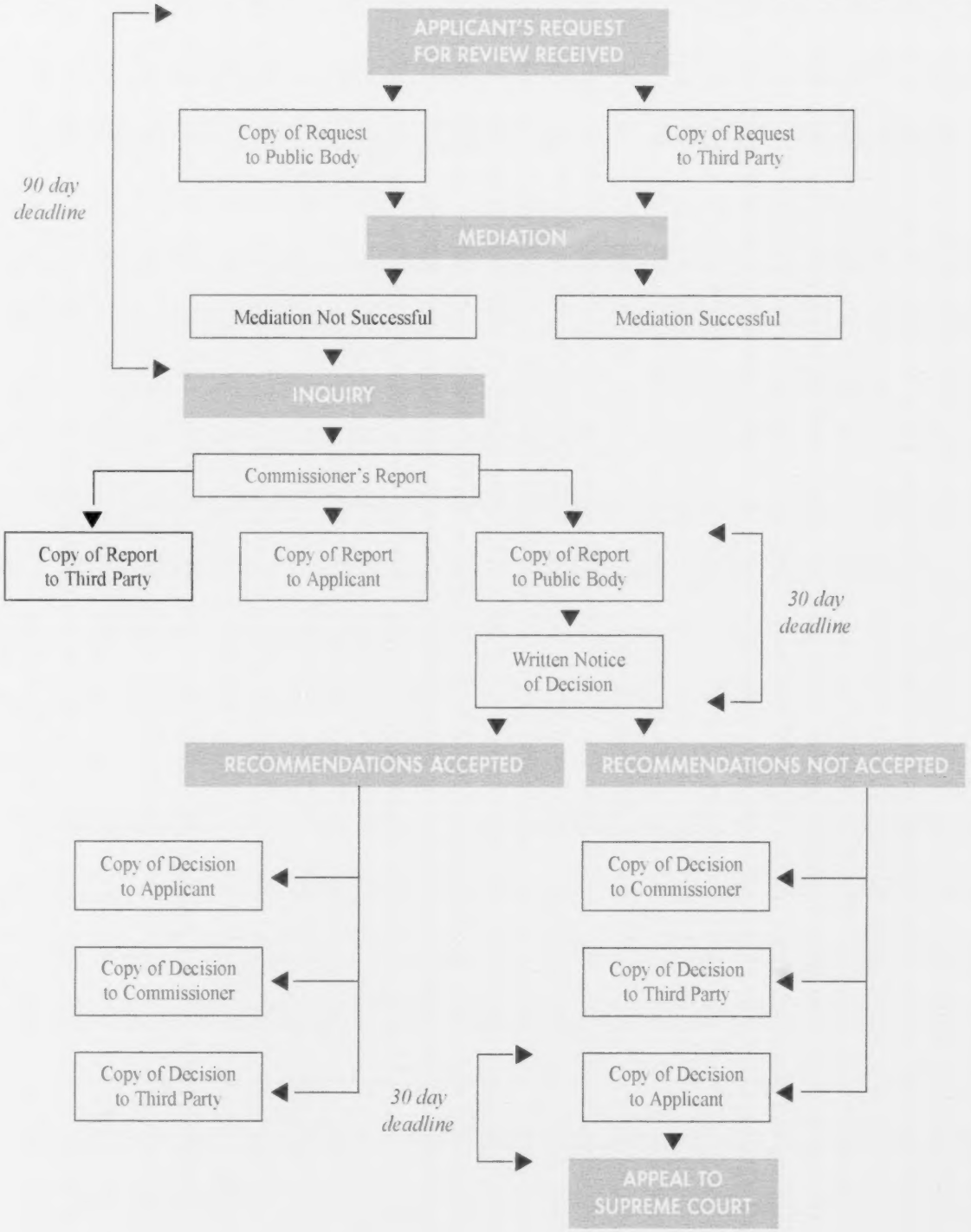
This is one of the challenges for the front-line ATIPP Coordinators working at various public offices, as well as the Assistant to the Information and Privacy Commissioner, who is authorized by the Commissioner to investigate and try to settle matters through mediation. The Assistant to the Commissioner has the flexibility to use an array of mediation techniques to identify the interests/needs of the applicant. By blending the rights set out in the *Act* and interest-based dispute resolution techniques, the Assistant to the Commissioner can elicit a better understanding of what the applicant wants. This can then assist in resolving matters between the parties.

Similarly, when information is first sought, identifying interests at an early stage can provide a foundation for resolving the matter successfully before it becomes a formal request under the *Act*.

It is not easy to balance the needs of the individual within a rights-based system and the statutory duty of the public body under the *Act*. It takes extra effort to utilize dispute resolution techniques, but these methods can save time in the long run, often reduce frustration and in the end, create a positive outcome for both the applicant and the public body.

This article is based in part on an article originally written by Sharon Kelly, a Masters student in Conflict Analysis and Management in Victoria, British Columbia for OIPC Voice March 2001 Issue 2.

Request for Review Flow Chart


APPLICANT'S REQUEST FOR REVIEW RECEIVED
Copy of Request to Public Body
Copy of Request to Third Party
90 day deadline
MEDIATION
Mediation Not Successful
Mediation Successful
INQUIRY
Commissioner's Report
Copy of Report to Third Party
Copy of Report to Applicant
Copy of Report to Public Body
30 day deadline
Written Notice of Decision
RECOMMENDATIONS ACCEPTED
RECOMMENDATIONS NOT ACCEPTED
Copy of Decision to Applicant
Copy of Decision to Commissioner
Copy of Decision to Third Party
30 day deadline
Copy of Decision to Commissioner
Copy of Decision to Third Party
Copy of Decision to Applicant
APPEAL TO SUPREME COURT

Statistical Summaries

ATIPP Complaints and Requests for Review

Public Body	Number of Cases 2000	1999
Community & Transportation Services	**2**	2
Economic Development	**1**	2
Education	**29**	11
Executive Council Office	**–**	2
Government Services	**1**	1
Health & Social Services	**4**	5
Justice	**8**	2
Public Service Commission	**6**	1
Renewable Resources	**2**	–
Yukon Workers' Compensation Health & Safety Board	**–**	6
Other Entities*	**8**	–
Other ATIPP matters**	**12**	–
Total	**76**	32

* *Requests were received in which the question has not yet been resolved as to whether the entity is a public body as defined by the ATIPP Act.*

** *These include a variety of complaints, reviews, investigations and miscellaneous files with no specific public body.*

Means of Settlement

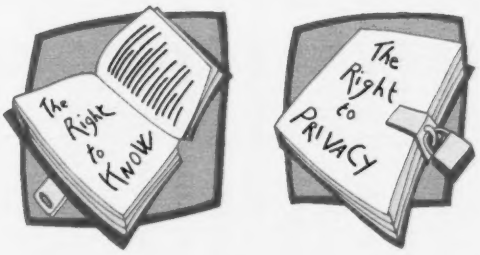
Settlement Type	Number of Cases 2000	1999
To inquiry	**27**	5
Section 42 complaint	**29**	10
Under investigation	**1**	–
Successfully mediated	**5**	2
Discontinued	**4**	5
Section 42 comment	**3**	5
Not yet completed	**2**	5
Section 42 request	**3**	–
Other	**2**	–
Total	**76**	32
Carried forward	**67**	26

Description	Relevant Section of the Act	Number of Cases 2000	1999
Request for a review on a refusal by the public body or the archivist to grant access to the record.	48(1)(a)	**24**	8
Request for a review on a decision by the public body or the archivist to separate or obliterate information from the record.	48(1)(b)	**2**	2
Request for a review on a decision about an extension of time for responding to a request for access to a record.	48(1)(c)	**1**	2
Request for a review on a decision by the public body or the archivist to not waive a part or all of a fee.	48(1)(d)	**1**	–
Request for a review on the public body's refusal or failure to correct personal information.	48(2)(a)	**2**	–
Request for a review on the public body's refusal or failure to annotate a record or to give notice of the annotation.	48(2)(b)	**2**	–
Request for a review on a complaint that a public body has not collected, used or disclosed information in compliance with the *Act*.	48(3)	**6**	6
Request for a review on a decision by a public body to disclose personal information about a third party.	48(4)	**2**	2
General powers to investigate complaints on the administration of the *Act*.	42(b)	**30**	10
General powers to comment on implications for access to information or for protection of privacy of existing or proposed legislative schemes or programs of public bodies.	42(c)	**3**	5
Powers to authorize a public body to disregard requests.	43(1)	**3**	–

* *Note: Several files are relevant to more than one section of the ATIPP Act, while others are not directly linked to one section of the Act. Hence the discrepancy in total numbers with other tables.*

ATTIP Cases by Public Body

* *Note: "Other" includes public bodies which had fewer than 4% of the total number, as well as cases in which there was no specific public body.*



Web Site Links

Alberta Freedom of Information and Protection of Privacy Publications
Several on-line publications on privacy. Of particular interest is the "Contractors' Guide to the *Freedom of Information and Protection of Privacy Act*" - a pamphlet that explains to contractors to the Government of Alberta how the *Freedom of Information and Protection of Privacy Act* affects them.

http://www.gov.ab.ca/foip/other_resources/index.cfm

British Columbia Information and Privacy Commissioner
Includes legislation, orders, information on decisions, investigations as well as other reports, information about the office, policies, news releases, publications and useful links.

http://www.oipcbc.org/

Government of Yukon
Home page of our local government. Links to Yukon facts, travel, government, government leaders, and news.

http://www.gov.yk.ca/

International Ombudsman Institute
Worldwide organization of Ombudsman offices.

http://www.law.ualberta.ca/centres/ioi/index.htm

Ontario Information and Privacy Commissioner
Includes Access and Privacy Acts, annual reports, a selection of investigations, policy papers, orders that have been issued by the office and links to other relevant sites.

http://www.gov.yk.ca/

Open Government Canada
A freedom of information coalition seeking a national voice for freedom of information users.

http://opengovernmentcanada.org

Privacy Commissioner of Canada
Home Page of the Federal Privacy Commissioner. Links to Privacy Acts, reports, presentations and numerous sites dealing with e-commerce privacy.

http://www.privcom.gc.ca

Yukon Office of the Ombudsman
Information about the Yukon Ombudsman and Information & Privacy Commissioner.

http://www.ombudsman.yk.ca